WRP ASIA PACIFIC SDN BHD v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22NCVC-580-02-2015]
19 SEPTEMBER 2016

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Repeated findings of meter-tampering – Whether provider of electricity supply had statutory right to disconnect – Consumer challenged validity of findings of meter-tampering and statutory right of provider of electricity supply – Application for interlocutory injunction pending outcome of trial – Whether there was bona fide serious issue to be tried – Whether damages were adequate remedy – Whether interlocutory injunction ought to be granted – Electricity Supply Act 1990, s. 38(1)*

PUBLIC UTILITIES: *Electricity – Disconnection of electricity supply – Repeated findings of meter-tampering – Statutory right of provider of electricity supply to disconnect electricity supply – Whether discretionary or mandatory – Electricity Supply Act 1990, s. 38(1)*

The plaintiff, a manufacturer of rubber gloves, was the consumer of the defendant, the provider of electricity supply. An inspection on the meter at the plaintiff's premises carried out by the defendant showed that the meter had been tampered with. According to the defendant, it had found previous tampering of the meter at the plaintiff's premises. Following the repeated findings of meter tampering, the defendant exercised its statutory right under s. 38(1) of the Electricity Supply Act 1990 ('the ESA') to disconnect the supply of electricity to the plaintiff's premises by issuing a disconnection notice. According to the plaintiff, (i) the consumption of electricity at the factory of its premises was recorded in the defendant's meter which was installed in the defendant's substation located outside the factory; and (ii) the substation was under the lock and key of the defendant who had exclusive control and possession of the latter. The plaintiff initiated the present action against the defendant to challenge the defendant's (i) findings of the meter tampering; and (ii) statutory right under s. 38(1) of the ESA to disconnect the supply of electricity. Stemming from the present action was an application for interlocutory injunction by the plaintiff to immediately prohibit the defendant from disconnecting its electricity supply. The issues that arose for the court's adjudication were (i) whether there was a *bona fide* serious issue to be tried; (ii) where the justice of the case was laid; and (iii) whether damages were an adequate remedy.

Held (allowing application):

(1) The defendant had sole and exclusive control of its substation where the meters were housed in and since the defendant was the only party having the key to the substation, it raised a serious issue to be tried as to whether the defendant should automatically penalise the plaintiff by

A disconnecting the supply of electricity to the plaintiff's premises. Furthermore, the word 'may' in s. 38(1) of the ESA means that the defendant has a discretionary power; not a mandatory one to exercise its right of disconnection. Such right is not an unbridled right. It does not mean that whenever the defendant discovers meter tampering, it could B automatically proceed to disconnect the supply of electricity. (paras 24-26)

(2) The balance of convenience tilts in favour of the plaintiff. If disconnection is proceeded with, it would cause grave injustice to the plaintiff which will suffer irreparable and irreversible loss to its C business, reputation, goodwill and ultimately, the closure of the plaintiff's factory. This would probably result in the retrenchment of the plaintiff's workers. Without an injunction being granted against the defendant pending the trial of this action, the defendant could, at any time, issue a fresh disconnection notice to the plaintiff. This would again D place the plaintiff at risk of a disconnection of the supply of electricity from now until the outcome of the trial. The interlocutory injunction ought to be given to the plaintiff. (paras 28, 31, 33 & 41)

(3) The defendant had not suffered any losses since the meters have been replaced after the defendant's discovery of the alleged tampering. There E appeared to be no basis or good reason for the defendant to discontinue the supply of electricity to the plaintiff's premises. If the defendant was allowed to cut off the supply of electricity, the plaintiff's entire operations would come to a standstill. The plaintiff would suffer immense and irreversible loss and the destruction of its business as well F as its goodwill, which it has built in the overseas market over the years. The disconnection of electricity supply would also affect other areas such as the workers' hostel, canteen and could result in serious accidents and consequences. Damages would not be an adequate remedy to the plaintiff. (paras 35, 36, 37 & 39)

G **Case(s) referred to:**

Adil Juta Sdn Bhd v. Tenaga Nasional Bhd [2014] 1 LNS 1022 HC ***(refd)***
American Cynamid v. Ethicon Ltd [1975] All ER 504 ***(refd)***
Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***
Keet Gerald Francis v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 HC ***(refd)***
H *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC* ***(refd)***
Pelantar Cergas (M) Sdn Bhd v. Tenaga Nasional Bhd [2014] 1 LNS 1642 HC ***(refd)***
Tan Yeong Kim v. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd [2016] 1 CLJ 318 HC ***(refd)***
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Legislation referred to:
Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(1)
Rules of Court 2012, O. 29 r. 1

For the plaintiff - MR Kumar & Moses Susayan; M/s Raja Badrol, Ramli & Azizi
For the defendant - Hadi Mukhlis; M/s Shook Lin & Bok

Reported by Najib Tamby

JUDGMENT

Yeoh Wee Siam J:

Enclosure 4

[1] This is the *ex parte* application of the plaintiff filed on 2 November 2015 under O. 29 r. 1 of the Rules of Court 2012 ("ROC") for an interlocutory prohibitory injunction. The plaintiff seeks the following orders:

(i) Satu injunksi menghalang defendan sama ada melalui diri mereka sendiri dan/atau agen-agen mereka dan/atau wakil-wakil mereka dan/atau pekerja-pekerja mereka ataupun disebaliknya dalam apa carapun daripada memotong dan/atau memberhentikan dan/atau mengganggu bekalan elektrik kepada kilang kedua Plaintif di Lot 5751-5753, Jalan Salak Tinggi, 43900 Sepang, Selangor Darul Ehsan, berasaskan kepada pemeriksaan yang kononnya telah dijalankan oleh defendan pada 3.10.2015 dan menurut notis pemotongan defendan bertarikh 29.10.2015;

(ii) Jika bekalan elektrik kepada Defendan telah dipotong satu perintah bahawa defendan menyambungkan semula atau menyebabkan sambung semula bekalan elektrik kilang kedua Plaintif di Lot 5751-5753, Jalan Salak Tinggi, 43900 Sepang, Selangor Darul Ehsan, dalam tempoh masa lima (5) jam dari penyampaian perintah ini ke atas Defendan;

(iii) Mahkamah Yang Mulia ini menetapkan satu tarikh bicara dalam masa dua (2) minggu dari tarikh perintah untuk perbicaraan notis permohonan plaintif di sini secara *inter partes*;

(iv) bahawa segala prosiding lain digantung sehingga pendengaran dan penyelesaian permohonan ini terlebih dahulu;

(v) kos permohonan ini dibayar oleh defendan; dan

(vi) relif-relif lain dan/atau relif lanjut seperti mana Mahkamah Mulia ini anggap patut dan adil diberikan.

Background Facts

[2] The plaintiff is a producer and manufacturer of rubber gloves.

[3] The defendant is the sole provider of the supply of electricity in Peninsular Malaysia.

[4] The plaintiff is a registered consumer of the defendant *vide* account no. 0147 00035871 02 for the plaintiff's premises. At all material times, the plaintiff's consumption of electricity at factory 2 of its premises is recorded in the defendant's meter which is installed in the defendant's substation, which is located outside the factory 2. The plaintiff alleges that at all material times the substation was under the lock and key of the defendant, and in the exclusive control and possession of the defendant.

[5] In the early hours of 3 October 2015, the defendant carried out an inspection of its meter at the plaintiff's premises. From this inspection, the defendant discovered that its meter at the plaintiff's premises had been tampered. The defendant documented all its findings of the meter tampering at the plaintiff's premises (exh. TNB3).

[6] The defendant alleges that it had found previous tampering of the defendant's meter at the plaintiff's premises. The finding of meter tampering on 30 July 2015 was the third time that the defendant discovered that its meter had been tampered with. The defendant's first two findings of meter tampering are the subject matter of a civil action in Shah Alam High Court, ie, Civil Suit No. 22NCVC-475-07-2013) (exh. TNB9).

[7] Following the repeated findings of meter tampering at the plaintiff's premises, the defendant decided to exercise its statutory right under s. 38(1) of the Electricity Supply Act 1990 ("ESA") to disconnect the supply of electricity to the plaintiff's premises. For this purpose, the defendant issued the disconnection notice dated 29 October 2015 to the plaintiff in respect of the meter tampering discovered during its inspection on 3 October 2015 at 2am (exh. TNB1) ("disconnection notice"). The disconnection notice informed the plaintiff that the supply of electricity to the plaintiff's premises would be disconnected on 30 October 2015.

[8] The plaintiff then filed this action on 29 October 2015 against the defendant to challenge the defendant's findings of the meter tampering, and the defendant's statutory right under s. 38(1) of the ESA to disconnect the supply of electricity to the plaintiff's premises. In its statement of claim, the plaintiff is applying for a declaration that the disconnection notice dated 29 October 2015 is invalid and void, and for an injunction and damages. The plaintiff also applied for this interlocutory injunction, seeking an immediate prohibition against the defendant from disconnecting its electricity supply.

Interim Injunction

[9] On 6 November 2015 both parties appeared before the Kuala Lumpur High Court, NCVC2, and informed the court that they have agreed that there be an interim injunction pending the *inter partes* hearing of encl. 4.

Transfer Of Case

[10] This case was subsequently transferred from NCVC2 to this court, NCVC4, pursuant to the directions of the managing judge dated 14 June 2016.

[11] During the first case management in NCVC4, I fixed encl. 4 for *inter partes* hearing before me on 3 August 2016.

Court's Decision Regarding Encl. 4

[12] On 3 August 2016, after hearing both parties, I gave the following decision on the plaintiff's application:

Prayer (i)	:	Allowed;
Prayers (ii), (iii) and (iv)	:	Struck out (as they are no longer relevant, according to learned counsel for the plaintiff);
Prayer (v)	:	Costs of RM2,500 are to be paid by the defendant to the plaintiff, subject to payment of the allocatur fee of 4% of the costs.

Grounds For Decision

The Law

[13] The principles governing the grant of an injunction are settled. In hearing an application for an interlocutory injunction, the judge is required to consider the following:

(1) whether there is a *bona fide* serious issue to be tried;

(2) where the justice of the case lies; and

(3) whether damages are an adequate remedy.

(See House of Lords decision in *American Cynamid v. Ethicon Ltd* [1975] All ER 504; and Court of Appeal decision in *Keet Gerald Francis v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293).

Evaluation And Findings

Whether There Is A Bona Fide Serious Issue To Be Tried

Plaintiff's Case

[14] The plaintiff contends that the defendant's substation is in the sole and exclusive control of the defendant. The keys of the substation are kept by the defendant. There was no complaint that the substation had been broken into or trespassed by anyone, prior to the filing of this action. The plaintiff submits that it has no knowledge or nexus to the purported tampering and ought not to be held responsible for any tampering, even if it is established.

[15] It is a fact that the defendant had replaced the meters in its substation after its purported discovery of the tampering of the meters on 3 October 2015.

Defendant's Right To Disconnect Supply Of Electricity

[16] On the other hand, the defendant contends that it is empowered to carry out a disconnection of the supply of electricity to its consumer's premises under s. 38(1) of the ESA.

[17] Section 38(1) of the ESA provides as follows:

> **38. Disconnection of supply of energy**
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> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37(3) or 37(14), the licensee or any person duly authorized by the licensee **may**, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises. (emphasis added).

[18] Section 37(1), 37(3) and 37(14) of the ESA provide as follows:

> 37(1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
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> …
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> …
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> (3) Any person who in any manner dishonestly:
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> (a) abstracts energy;
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> (b) consumes energy;
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> (c) uses energy;
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> (d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of energy; or
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> (e) prevents any such meter or instrument from duly recording the output or consumption of energy,
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> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.
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> …
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> …

> (14) Any person who **damages any meter or other instrument used on** or in connection with **any licensed installation for recording the output or consumption of energy** shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both. (emphasis added).

[19] The defendant submits that s. 38(1) of the ESA authorises the defendant to disconnect the electricity supply to its consumers' premises upon the finding of meter tampering as envisaged by s. 37(1), (3) and (14) of the same Act.

[20] The defendant submits further that its powers under s. 38(1) of the ESA have been consistently recognised by our courts at every level.

[21] The Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 held as follows:

> [25] Let us now scrutinise the letter. Even though the effect of the letter is quite harsh, *s. 38 of the Act empowers the respondent to discontinue the supply of electricity based on the subjective finding of its employee if any offence has been found committed under s. 37(1), 37(3) or 37(14)* ... (emphasis added).

[22] In *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892; [2007] 1 MLJ 217, the Court of Appeal held, *inter alia*, that in exercising its powers under s. 38(1) of the ESA, it is not required that an offence has been committed before action can be taken under the same section.

(See also High Court decision in *Tan Yeong Kim v. Tenaga Nasional Bhd* [2000] 8 CLJ 629; *Pelantar Cergas (M) Sdn Bhd v. TNB* [2014] 1 LNS 1642; and *Adil Juta Sdn Bhd v. Tenaga Nasional Bhd* [2014] 1 LNS 1022).

[23] In view of the above cases, the defendant submits that:

(1) s. 38(1) was formulated for the crucial purpose of providing TNB with effective powers to stop and prevent the continuation of any meter tampering discovered;

(2) the discovery of any meter tampering, for purposes of TNB carrying out any disconnection under s. 38(1), shall be on TNB's subjective finding;

(3) there is no need for the finding of meter tampering to be confirmed by Court and/or a need for there to be a conviction of the perpetrator of the meter tampering before TNB is entitled to carry out its right to disconnect the electricity supply. In this regard, the identity of the perpetrator of the meter tampering is immaterial to TNB's right under s. 38(1) ESA 1990;

(4) TNB is only required, under s. 38(1) ESA 1990, to provide its consumer with a 24-hour notice prior to exercising its statutory power to disconnect the supply of electricity following its finding of meter tampering;

A (5) TNB statutory right and/or power to disconnect the electricity supply under s. 38(1) ESA 1990 is independent of its right to initiate a civil claim against its consumer for any loss of revenue suffered as a result of the meter tampering discovered (under s. 38(3) to (5) ESA 1990); and

B (6) TNB's statutory rights and/or power to carry out the disconnection of electricity supply (as stipulated under s. 38(1) ESA 1990) and to make a subsequent claim for loss of revenue (as stipulated under ss. 38(3) to (5) ESA 1990) are set in stone by Parliament.

[24] Whilst I accept the defendant's submissions, based on the cited cases, C that the defendant has a statutory power under s. 38(1) of the ESA to disconnect the supply of electricity upon an offence being committed under s. 37(1), (3) or (14), it must be noted that the word used in s. 38(1) is "may". This means that the defendant has a discretionary power, and not a mandatory power, to exercise its right of disconnection given under the same section. In my view, such right is not an unbridled right. It does not mean D that in every case where the defendant discovers tampering of the meter, the defendant can automatically proceed to disconnect the supply of electricity.

[25] In this case, by the fact that the defendant has sole and exclusive control of its substation where the meters are housed in, and since the E defendant is the only party having the key to the substation, it raises a serious issue to be tried as to whether the defendant should automatically penalise the plaintiff by disconnecting the supply of electricity to the plaintiff's premises.

[26] As submitted by the plaintiff, after the defendant's inspection on F 3 October 2015, the defendant had already replaced the tampered meters with two sets of new meters. It raises therefore the serious triable issue whether the defendant ought to proceed to disconnection of the electricity supply to the plaintiff's premises now that the new meters are recording accurate readings of the consumption of electricity.

G *Where The Justice Of The Case Lies*

[27] With the new meters installed, the defendant no longer suffers any loss of revenue. There is therefore no compelling reason that at this stage that the defendant ought to disconnect the supply of electricity to the plaintiff's premises.

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[28] On the other hand, if disconnection is proceeded with, it would cause grave injustice to the plaintiff which will suffer irreparable and irreversible loss to its business, reputation, goodwill and ultimately the closure of the plaintiff's factory. This would probably result in the retrenchment of the I plaintiff's workers.

[29] In the recent case of *Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd* [2016] 1 CLJ 318, the Johor Bahru High Court considered the issue whether TNB is entitled to disconnect the supply of electricity if the offence under

s. 37 of the ESA was no longer continuing. Mohd Nazlan Ghazali JC, in expressing concurrence with the conclusion reached by the High Court in *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd* [2015] 6 CLJ 788, and *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 3 CLJ 825 stated as follows:

> [22] I am in agreement with the approach adopted in *Modernria* and *Mayaria* on the construction of s. 38(1) of the ES Act, the basis being the judicial pronouncement made by the Court of Appeal in *Claybricks* and by the Federal Court in *WRP Asia Pacific* as to the reason why TNB, a licensee under the ES Act should be given the statutory power to disconnect electricity supply. Which is quite simply to act swiftly to avoid further illegal usage by the perpetrator continue unabated. It thus necessarily follows by commonsensical deductive logic and elementary legal reasoning that if the said purpose for the exercise of the power to disconnect under s. 38(1) is no longer subsisting and ceases to exist, such power cannot lawfully be invoked. …
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> [26] It is my view that the proposition of law that under s. 38(1) of the ES Act, TNB can only lawfully disconnect when the offence is still continuing **and conversely cannot if it has since ceased** is premised not merely on the justification that the law permits recourse to the purporsive interpretation of the statute when there is no ambiguity …
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> [27] It cannot therefore be wholly accepted that previous judicial pronouncements such as in *Claybricks and Tan Yeong Kim lwn. Tenaga Nasional Berhad* [2000] 8 CLJ 629 that suggested that s. 38(1) is clear and unambiguous can be considered a settled position, not least **because the specific question to be answered in the instance case was only truly and pointedly first considered in *Modernria*.** In other words, a true reading of the provisions of s. 38(1) of the ES Act cannot be argued to proscribe a construction other than its literal and ordinary meaning … (emphasis added).

[30] I further considered the fact that the trial of this action has already been fixed by this court on 22 September 2016, 23 September 2016, 13 October 2016, and 14 October 2016, ie, in less than two months' time.

[31] The balance of convenience tilts in favour of the plaintiff. It is in the interest of justice that the *status quo* be maintained until the outcome of the trial.

[32] The defendant submits that the injunction sought in prayer (i) is now rendered academic. This is for the reason that the disconnection notice dated 29 October 2015 is to give notice for disconnection of the supply of electricity to the plaintiff's premises on 30 October 2015 as stated in the notice. That date is now past and no longer relevant.

[33] However, I considered the plaintiff's submission that without an injunction being granted against the defendant pending the trial of this action, the defendant can, at any time, issue a fresh disconnection notice to the

plaintiff based on the alleged tampering on 3 October 2015. This would again put the plaintiff to be at risk of a disconnection of the supply of electricity from now until the outcome of the trial.

[34] To my mind, if indeed the disconnection notice has already lapsed, then I see no good reason why the defendant had agreed with the plaintiff and informed the court on 6 November 2015, and further gave the undertaking not to enforce the disconnection notice dated 29 October 2015 until the *inter partes* hearing and disposal of the plaintiff's application in encl. 4. By the fact that from 6 November 2015 until the date of hearing of encl. 4, ie, on 3 August 2016, the defendant had been willing to be bound by its undertaking not to enforce the disconnection notice, it shows that the injunction is still relevant and necessary for the plaintiff at the material time.

Whether Damages Are An Adequate Remedy

[35] The defendant has not been suffering any losses ever since the meters have been replaced after the defendant's discovery of the alleged tampering. There appears to be no basis or good reason for the defendant to discontinue the supply of electricity to the plaintiff's factory 2.

[36] On the other hand, as submitted by the plaintiff, if the defendant is allowed to cut off the supply of electricity, then the plaintiff's entire operations at its said factory would come to a standstill. The plaintiff is one of the largest rubber glove manufacturers in Malaysia and exports its products to about 50 countries worldwide. It has approximately 750 workers in the said factory and it operates the factory 24 hours. These employees would become redundant. The plaintiff will not be able to meet the demands of its customers, who are all from overseas. The plaintiff would suffer immense and irreversible loss and the destruction of its business as well as its goodwill, which it has built in the overseas market, over the years.

[37] The disconnection of electricity supply to factory 2 will also affect other areas such as the worker's hostel, canteen and another company known as Grand Ten Holdings Sdn Bhd ("Grand Ten"). Grand Ten is a company located adjacent to factory 2 and it receives its supply of electricity through account no: 0147 00035871 02, which is the plaintiff's account at factory 2.

[38] The disconnection of electricity supply to Grand Ten could also result in serious accidents and consequences. This is because Grand Ten is in the business of gamma sterilisation of gloves and other industrial products. Grand Ten's main customer is the plaintiff, where the surgical gloves produced by the plaintiff are sterilised at Grand Ten (see paras. 7-9 of plaintiff's affidavit tambahan in encl. 7 on the serious consequences that could result from disconnection of electricity supply). The importance of electricity supply from the defendant to Grand Ten is, among others, to chill the radioactive material "cobalt 60", which is submerged into a 30 ft pool

of water, with a chiller (machine). In the event of prolonged disconnection of power supply from the defendant where the backup generator to power the chiller machine is insufficient, the heat from cobalt 60 could cause fire and result in the radioactive material to leak, which is hazardous to general public.

[39] From the evidence adduced by the plaintiff, which is not rebutted by the defendant, it is without doubt that damages would not be an adequate remedy to the plaintiff.

[40] The plaintiff, in making the application, has given its undertaking on damages should any arise from the granting of the injunction.

Conclusion

[41] Based on the above considerations, the court is satisfied, on a balance of probabilities, that the interlocutory injunction ought to be given to the plaintiff pending the outcome of the trial on the plaintiff's action.

[42] I stress here that this decision is only in regard to the plaintiff's application. The merits of the plaintiff's claim in its writ of summons and statement have to be decided at the trial.

Order accordingly.